IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 24TH SEPTEMBER 2007 / 2ND ASWINA 1929

RSA.No. 518 of 2005()

AS.61/2003 of DISTRICT COURT, KOTTAYAM
OS.497/1995 of PRL.M.C., KOTTAYAM

.....

APPELLANT : APPELLANT/PLAINTIFF

P.P.YOHANNAN, PANACHIMOOTTIL,
POOVANTHURUTHU KARA, PANACHIKADU VILLAGE.

BY ADV. SRI.M.P.MADHAVANKUTTY

RESPONDENTS: RESPONDENT/DEFENDANT

PATHROSE YOHANNAN,
S/O.ANNA, PANACHIMOOTTIL,
POOVANTHURUTHU KARA, PANACHIKAD VILLAGE.

BY

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 24/09/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER ON I.A.990/2005 IN R.S.A.NO.518/2005

24.9.07 DISMISSED Sd/- M.Sasidharan Nambiar
Judge

/true copy/

P.S. To Judge

M.SASIDHARAN NAMBIAR,J.

==========

R.S.A. NO. 518 OF 2005

==========

Dated this the 24th day of September, 2007

JUDGMENT

Plaintiff in O.S.497/1995 on the file of Principal Munsiff Court, Kottayam is the appellant. Defendant is the respondent. Appellant instituted the suit seeking a decree for declaration of right of easement and a permanent prohibitory injunction. Case of the appellant is that item No.1 of plaint schedule property belongs to him and he has constructed a house 28 years prior to the institution of the suit and is residing therein and item No.2 is the adjacent northern property belonging to the respondent and there is a panchayat road on the eastern side of item No.2 of plaint schedule properties and item No.3 is a pathway leading from item No.1 to the panchayat road through the northern side of item No.2 of plaint schedule property and except that way appellant has no other way to the public road and

he has right of easement by prescription over item No.3 of plaint schedule property and therefore he is entitled to a decree for declaration of his right of easement and permanent prohibitory injunction restraining respondent from causing any obstruction to that pathway.

2. Respondent in his written statement contended that item No.3 of plaint schedule property is part of his property and there is no pathway as claimed and appellant has no right of easement either by necessity or prescription and originally all the properties belonged to Yohannan and the total extent of the property was 97 ½ cents and as per the partition deed of 1994/1120 M.E properties were divided among the three children and as per that partition, Anna, the mother of respondent obtained 15 cents and 41 ¼ cents was set apart to Itty and 41 ¼ cents was set apart to Pathrose, father of the appellant and out of 41 ¼ cents 13 cents with tharwad house was given to Issac as per settlement deed No.496/87. On the

same date 3 ¼ cents on the western side was given to Saramma, sister of the appellant and as per settlement deed dated 19.6.1987 13 cents was given to appellant by his father and it is thereafter appellant constructed the house in item No.1 of plaint schedule property and a panchayat road exist on the western side of that property and the properties were divided considering the availability of pathway and no right of way exist over item No.2 of plaint schedule property and therefore appellant is not entitled to the decree sought for. In the additional written statement it was contended that appellant is not entitled to claim a right of easement by prescription or necessity and they are contradictory to each other.

3. Learned Munsiff on the evidence of Pws.1 to 4 and Dws. 1 to 3 and Exts.A1 to A7, B1 and B2, C1 and C2, dismissed the suit holding that appellant did not establish either a right of easement by prescription or easement by necessity. Appellant

challenged the decree and judgment before District Court, Kottayam in A.S.61/2003. Learned District Judge on reappreciation of evidence confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

4. Learned counsel appearing for appellant was heard.

5. The argument of learned counsel is that Ext.C1 report establishes existence of item No.3 of the plaint schedule pathway and the fact that appellant is residing in item No.1 of plaint schedule property after constructing a house is proved by evidence of appellant as PW1 and evidence of Pws. 1 to 4 establish that item No.3 of the plaint schedule property has been used as a way for more than 28 years without obstruction and as of right and as an easement to reach the eastern public road and courts below were not justified in holding that appellant did not establish a right of way by easement prescription. It was argued that existence of an alternate way is not a valid ground

to disallow the right of easement by prescription and therefore the fact that there is a public road on the western side of item No.1 of the property by itself will not negative the claim for right of easement by prescription and on the evidence it should have been found that appellant is entitled to the decree sought for.

6. On hearing the learned counsel I do not find any substantial question of law involved in the appeal.

7. It is true that when a right of easement by prescription was claimed, existence of alternate pathway available to the plaintiff by itself is not a ground to reject the claim as is the case of right of easement by necessity. But courts below did not dismiss the suit on the ground of existence of an alternate way. Both the courts on analysing the evidence found that appellant did not establish that item No.3 of plaint schedule property has been used as a way to reach item No.1 of plaint schedule property from the eastern road. While appreciating

the case of appellant courts below found that on the western side of item No.1 of plaint schedule property a public road exist and that was taken as a ground for disbelieving the version of PW1. On the facts and circumstances of the case, it cannot be said that the view taken by the courts below is not correct. What was contended in the plaint itself was that item No.3 of plaint schedule property is the only way available to the appellant to reach item No.1 of plaint schedule property. There is no case that there is a public road on the west and being a circuitus way, as explained by PW1, it was not being used and instead item No.3 of plaint schedule property has been used as a way. On the other hand, suppressing the existence of western public road, a case was sought to be projected that except item No.3 of plaint schedule property, there is no other access to item No.1 of plaint schedule property. It is in the light of the said contention, courts below considered the existence of the western public road available to

reach item No.1 of plaint schedule property. Though Pws.2 to 4 were examined, courts below on appreciating the evidence found that their evidence is insufficient to prove that item No.3 was being used as a way by the appellant and that too as of right and as an easement. That factual finding arrived at by the courts below, on appreciating the evidence cannot be interfered by reappreciating the evidence in exercise of the powers of this court under section 100 of Code of Civil Procedure. The appreciation of evidence by courts below cannot be said to be perverse warranting reappreciation of evidence. Appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006